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Supreme Court of the United States

CITY OF EVANSVILLE, WISCONSIN, and CHRISTOPHER JONES, individually and in his official capacity as an employee of the City of Evansville Police Department, and COMMUNITY INSURANCE CORPORATION,

Petitioners,

v.

DAVID DEICHER and MARY A. MEZERA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals improperly created a new standard for abuse of discretion that conflicts with this Court's established abuse of discretion jurisprudence, undermines district courts' longstanding inherent power to control trials and manage juries, and creates a split of authority among the circuit courts, when it ordered a new trial on damages because it concluded that there was a "reasonable possibility" that the district court's decision denying Plaintiffs' counsel's belated request to send an exhibit to the jury during deliberations affected the amount of the damages verdict, even though the exhibit was never used in the damages phase of the trial.

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INTRODUCTORY PRAYER

The Petitioners respectfully request that The United States Supreme Court grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 19, 2008.

OPINIONS BELOW

This case is an action arising under the Driver's Privacy Protection Act, 18 U.S.C. § 2721, *et seq.* ("the DPPA") and was tried to a jury in a bifurcated trial. After a one-day trial on liability on February 12, 2007, the jury returned a verdict of liability. The following day, the jury returned a verdict on damages awarding Plaintiffs a combined total of $25,000.[1] The trial court entered judgment in favor of Plaintiffs on February 14, 2007 in accordance with the verdict.[2] Plaintiffs appealed, and the United States Court of Appeals for the Seventh Circuit reversed and ordered a new trial on damages in an Opinion dated September 19, 2008. *Deicher v. City of Evansville*, 545 F.3d 537, 544-45 (7th Cir. 2008).[3]

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[1] The jury awarded compensatory damages in the amount of $14,500 to Plaintiff Mezera, compensatory damages in the amount of $1,000 to Plaintiff Deicher and punitive damages against Officer Jones in the amount of $5,500. The Court, based upon a Stipulation by the parties, increased the compensatory damage award to Plaintiff Deicher from $1,000 to $5,000 based upon the statutory minimum under the Driver's Privacy Protection Act for a finding of a violation.

[2] The Judgment is attached as Appendix C. (R.77.)

[3] The Opinion of the Seventh Circuit Court of Appeals is included as Appendix A.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on September 19, 2008. This Petition is timely filed according to Supreme Court Rule 13.1. The Court derives its jurisdiction from 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Summary

In its decision below, the Seventh Circuit Court of Appeals created a new standard for abuse of discretion that conflicts with this Court's established abuse of discretion jurisprudence, undermines district courts' well-established inherent power to control trials and manage juries, and creates a split among the circuit courts as to the proper standard for abuse of discretion. The Seventh Circuit ordered a new trial on damages based on the district court's discretionary decision denying Plaintiffs' counsel's belated request to provide an exhibit to the jury after deliberations had begun. Despite the fact that the jury never asked for the exhibit and that it was never utilized during the damages phase of the trial, the court of appeals concluded there was a "reasonable possibility" that the district court's decision affected the amount of the damages verdict.

Under the Seventh Circuit's decision, a mere "possibility" that a party was prejudiced by a district court's decision is sufficient to find an abuse of discretion and order a new trial. This new standard conflicts with established precedent from this Court that requires a

showing of actual prejudice before finding an abuse of discretion and ordering a new trial. The Seventh Circuit's decision will have the effect of stripping district courts of their historic discretion to control what materials a jury may view during deliberations, as it will in effect require them to provide juries with all properly admitted exhibits during deliberations to avoid reversal. Finally, the Seventh Circuit's new standard creates a conflict among the circuits as it is inconsistent with the standards utilized by other federal circuit courts to evaluate a district court's interaction with the jury for error.

Because the Seventh Circuit's decision below conflicts with this Court's established precedent, undermines the inherent power of district courts, and creates a conflict among the circuit courts, this Court should grant this Petition for a Writ of Certiorari and should reverse the decision of the Seventh Circuit Court of Appeals.

B. Procedural History

David Deicher and Mary Mezera, husband and wife, sued the City of Evansville, one if its police officers, Christopher Jones, and the city's liability insurer, Community Insurance Corporation, claiming that Officer Jones had obtained and disclosed Mezera's resident address to her ex-husband in violation of the DPPA. Officer Jones claimed that the disclosure of the address was within the service of process exception contained in the DPPA. On February 12th and 13th, 2007, the case was tried to a jury in the United States District Court for the Western District of Wisconsin. The

trial was bifurcated with a one-day trial on liability occurring on February 12, 2007. The jury returned a verdict finding that Officer Jones had obtained and disclosed Mezera's address in violation of the DPPA.

On February 13, 2007, the parties tried the issue of damages to the jury. Plaintiffs' counsel requested the jury award compensatory and punitive damages in excess of one million dollars. The jury returned a verdict awarding Plaintiffs $21,000.00 in compensatory and punitive damages. The district court later increased the damage award by $4,000.00 to comply with the statutory minimum damage award required under the DPPA. On February 14, 2007, the District Court entered judgment for Plaintiffs and against Defendants in the amount of $25,000.00.

During deliberations on damages, the jury sent out the following question: "On what date was this case filed by Plaintiff?" The trial court, following a discussion with counsel, decided to answer the question as follows: "Members of the jury, the case was filed by the Plaintiff in this Court on June 30, 2006 at 1:48 p.m." Plaintiffs' counsel objected and requested that the Court provide a copy of Plaintiffs' Notice of Claim, dated April 21, 2006, to the jury, speculating that the jury actually wanted to know the date the Notice of Claim was received rather than when the lawsuit was filed. Notably, the jury never requested to see a copy of the Notice of Claim during deliberations of either phase of the trial. Moreover, Plaintiffs' counsel did not ask the court to provide the Notice of Claim to the jury following the damages phase of the trial. In fact, neither side mentioned the Notice of Claim during presentation of evidence during the

damages trial or during opening statements or closing arguments. The trial court, in the exercise of its discretion, denied Plaintiffs' counsel's request to send the Notice of Claim to the jury and instead provided a factually correct response to the jury's inquiry concerning the date the Complaint was filed.

On March 1, 2007, Plaintiffs moved pursuant to Rule 59 of the Federal Rules of Civil Procedure to set aside the jury verdict and for a new trial on damages. Plaintiffs also moved for costs and attorney fees. (App. B; R.99 at 1.) The district court denied the motion on April 13, 2007, concluding the damages sought "were outlandish and unreasonable based on the evidence in the record." (*Id.* at 10.) The district court further concluded that its decision to inform the jury of the date the Complaint was filed rather than provide the Notice of Claim did not affect the verdict because the jury did not ask for the Notice of Claim and the answer provided by the court was truthful. (*Id.* at 4-5.)

On appeal, Plaintiffs contended that the trial court made a number of errors, including its failure to provide the Notice of Claim to the jury during the damages deliberations. The United States Court of Appeals for the Seventh Circuit agreed and granted Plaintiffs a new trial on damages based on the trial court's decision to answer the jury's question with an accurate factual response, rather than providing a document for which they never asked. The Court of Appeals believed the failure to provide the Notice of Claim "possibly" affected the verdict in light of the low amount of damages the jury awarded. The Court of Appeals ruled: "Thus, we hold that a new trial is required if there is a reasonable

possibility that a party is prejudiced by the District Court's failure to provide certain exhibits to the jury, even if the exhibits are properly admitted." *Deicher v. City of Evansville*, 545 F.3d 537, 543 (7th Cir. 2008).

C. Statement of Facts

On February 9, 2007, the trial court held the final pretrial conference with counsel and, among other things, heard arguments and ruled on the admissibility of trial exhibits, reserving as to relevance. A Notice of Claim (Plaintiff's Exhibit 5) submitted by Plaintiffs pursuant to Wisconsin law,[4] was admitted into evidence at the final pretrial conference, subject to relevance objections.

Pursuant to the court's standard procedure used in most jury trials in the United States District Court for the Western District of Wisconsin, liability and damages were bifurcated for purposes of trial. The liability phase of the present action took place on February 12th. During cross-examination of City of Evansville Police Chief Scott McElroy, Plaintiffs' counsel introduced Exhibit 5, the Notice of Claim that Plaintiffs had submitted to the City of Evansville. (R.78 at 114.) Chief McElroy identified that the Notice of Claim was dated April 21, 2006. (*Id.* at 115.) Officer Jones testified on direct examination that he first saw the Notice of Claim on April 22, 2006. (*Id.* at 46-47.)

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[4] The timely submission of a Notice of Claim, pursuant to Wis. Stat. § 893.80(1) is a prerequisite to suing a Wisconsin municipality or a municipal official as to certain state law causes of action.

Officer Jones further denied revising his police report after he received the Notice of Claim—as Plaintiffs alleged. (*Id.* at 47.) Neither side made any other reference to the Notice of Claim during presentation of evidence in the liability portion of the trial.

During closing argument on liability, Plaintiffs' counsel argued that the Notice of Claim related to the liability issues. (*Id.* at 159-60.) The Defendants' position in this action was that Officer Jones obtained and disclosed Mezera's address pursuant to the service of process exception in the DPPA. Plaintiffs alleged that Officer Jones modified his report after receiving the Notice of Claim in order to fit within the statutory exception. After closing arguments and jury instructions, the Court followed its normal procedure and instructed counsel to determine what exhibits should go to the jury during deliberations. (*Id.* at 183.) The court advised the parties that it would resolve any conflict if the parties had disagreements as to which exhibits should go to the jury room. (*Id.*)

The parties were unable to reach an agreement as to several exhibits, including Exhibit 5—the Notice of Claim. (*Id.* at 185.) The Court heard argument from counsel regarding Exhibit 5 and ruled that it would not be provided to the jury during deliberations on liability. (*Id.* at 186.) Plaintiffs never appealed this decision by the district court. Following deliberations, the jury returned a verdict finding Defendants liable for violation of the DPPA (R. 72.)

The next day, the parties tried the issues of damages to the jury. Neither side questioned any witnesses or

presented any evidence concerning the Notice of Claim during the damages phase of the trial. The Notice of Claim was never introduced into evidence. Moreover, neither side referenced the Notice of Claim during opening statements or closing arguments. In short, the Notice of Claim was not mentioned or referenced during any part of the damages trial. At the end of the trial, Plaintiffs' counsel requested that the jury award millions of dollars in compensatory and punitive damages (again without mentioning the Notice of Claim). (R.79 at 192-96.)

Following closing arguments on damages, the trial court again asked counsel to determine which exhibits should go to the jury and made itself available to resolve any disputes. (*Id.* at 229.) Counsel agreed which exhibits would be provided to the jury. Neither counsel for Plaintiffs nor counsel for Defendants requested that the Notice of Claim be provided to the jury during deliberations on damages.

During deliberations, the jury sent out the following question: "On what date was this case filed by Plaintiff?" (*Id.* at 230.) After listening to argument by counsel, the Court proposed to answer the jury's question as follows: "Members of the jury, the case was filed by the Plaintiff in this Court on June 30, 2006, at 1:48 p.m." (*Id.* at 233.) Plaintiffs' counsel objected, speculating that the date that the jurors in fact wanted was the date of the Notice of Claim, and he requested that the court provide the jury with the Notice of Claim document. (*Id.* at 230-31.) The trial court disagreed that the jury wanted something other than what it expressly requested—

the date the Complaint was filed—and therefore denied the request to send the Notice of Claim to the jury. (*Id.* at 232.)

Notably, the jury never requested to see the Notice of Claim. (*Id.* at 230-50.) After receiving the response from the Court, the jury completed its deliberations and returned a verdict awarding damages.

Plaintiffs appealed the jury's damages verdict, contending, in part, that the trial court erred in declining to give the jury the Notice of Claim. The United States Court of Appeals for the Seventh Circuit agreed and ordered a new trial. The Court held that the trial court should have granted Plaintiffs' counsel's request to send the Notice of Claim to the jury because it was "possible" the jury wanted to see the Notice of Claim (even though the jury had not requested the Notice of Claim and the Notice of Claim had not been mentioned by any witness or counsel during the trial on damages) and the district court's failure to provide it "possibly" affected the verdict. This conclusion was based on the court of appeals' determination that failing to provide the Notice of Claim "possibly" influenced the amount of damages awarded because Plaintiffs' attorney asked for millions of dollars in damages, and the jury awarded only a fraction of the amount. Notably, the district court had concluded "[t]he recovery sought by the plaintiffs was outlandish as well as unreasonable based on the evidence presented." (App. B; R.99 at 10.)

D. Jurisdiction of the District Court and Court of Appeals

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 in that the present action arises under 18 U.S.C. § 2721, *et seq*. The United States Court of Appeals for the Seventh Circuit had jurisdiction to hear the appeal under 28 U.S.C. § 1291 in that a final judgment was entered on February 14, 2008.

REASONS FOR GRANTING THE PETITION

A. Summary of Reasons for Granting the Writ

Historically, courts have been afforded wide discretion in managing the course of trials in their courtroom, particularly with regard to decisions concerning evidence and jury management. The issue presented in this Petition implicates the inherent power of all trial courts to control the course and conduct of trial, their ability to respond to juror questions, and their discretion to determine what exhibits a jury should view during deliberations. The Seventh Circuit's decision in this case conflicts with the traditional, accepted test for abuse of discretion—which requires a demonstrated occurrence of actual prejudice—and creates an entirely new standard by requiring only a speculative argument of "possible" prejudice to reverse the district court.

The Seventh Circuit's new standard contravenes longstanding precedent from this Court and the historic deference accorded to district courts in managing proceedings and juries. Further, it creates a split of authority among the federal circuit courts as to when a

trial court abuses its discretion when answering questions from the jury and deciding what exhibits the jury should consider during deliberations. This Court's jurisprudence and that of several federal circuit courts require a showing of actual prejudice to conclude a district court's discretionary decision constituted "clear" or "manifest" error. The Seventh Circuit's decision in *Deicher* substantially lowers this standard and allows the mere possibility of prejudice to dictate a district court's actions. If allowed to stand, the Seventh Circuit's new standard will strip trial courts of their discretion and require trial judges to furnish all admitted exhibits to the jury during deliberations.

B. The Seventh Circuit's New "Possibility of Error" Standard Conflicts With This Court's Established Precedent Governing a Trial Court's Discretionary Powers and Inherent Authority to Manage the Mode and Method by Which Evidence is Considered During Trial.

In this case, while deliberating over the damages phase of the trial, the jury asked the district court for the date when Plaintiffs' complaint was filed. In response to this inquiry, Plaintiffs' attorney requested that the court provide the jury with a copy of Plaintiffs' Notice of Claim (not the complaint). The Notice of Claim was admitted into evidence during the liability phase, but was never mentioned by any witness or counsel during the damages phase. Moreover, Plaintiffs' counsel never requested that the exhibit go to the jury before deliberation in the damages phase of the trial. The jury never requested to see the Notice of Claim. The district court exercised its discretion and determined that the

proper response to the jury's question about when the case was filed was to provide a factually correct answer and it denied Plaintiffs' counsel's request to send the Notice of Claim to the jury.

The Seventh Circuit Court of Appeals concluded that this innocuous, accurate response to a jury's factual question constituted an abuse of discretion because there was a "possibility" that the jury really wanted to know when the Notice of Claim was filed because the jury awarded substantially less damages than Plaintiffs' counsel had requested. *Deicher*, 545 F.3d at 544-45. The court proclaimed that "a new trial is required if there is a reasonable possibility that a party is prejudiced by the district court's failure to provide certain exhibits to the jury, even if the exhibits are properly admitted." *Id.* at 543.

This Court has long required that a party must demonstrate actual prejudice before it will conclude a district court erroneously exercised its discretion and grant a new trial. A party must demonstrate "such action was so clearly prejudicial to them that the [decision] constituted a plain abuse of discretion." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940).[5] Further, this Court has stated that "[t]here is a complete

[5] The closest case on point decided by this Court is *Haupt v. United States*, 330 U.S. 631, 643 (1947) where the defendant in a treason trial objected to the trial court's decision to provide the jury with a written copy of the court's charge during deliberations. However, this Court summarily dismissed the objection, stating: "We find nothing in any of [the objections] to warrant the inference of unfairness or irregularity in the trial." *Id.*

lack of any showing of abuse of discretion . . . [if] no prejudice has been established." *Id. See also Hamling v. United States*, 418 U.S. 87, 139 (1974) (trial court did not commit "clear abuse of discretion" when refusing to ask potential jurors certain questions during voir dire because the requested questions were cumulative and no actual prejudice was shown); *Ham v. South Carolina*, 409 U.S. 524, 528 (1973) (trial court has no duty to examine jurors during voir dire about possible biases against people with beards). In the evidentiary context, this Court has held that a judge need "not prevent *all* prejudice" to a party; rather, his charge is to ensure that evidence does "not *unduly* prejudice" a party. *United States v. Abel*, 469 U.S. 45, 54-55 (1984) (emphasis in original).

Allowing a reviewing court to order a new trial based on the existence of the mere possibility of prejudice contravenes this Court's settled law that the abuse of discretion standard is extremely deferential and its centuries-old requirement that a reviewing court must find a discretionary ruling to be "manifestly erroneous" before reversing. As long ago as *Congress and Empire Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878), this Court established that an appellate court will not reverse a trial court's discretionary decision concerning the use of evidence at trial "unless the ruling is manifestly erroneous." *See also Reynolds v. United States*, 98 U.S. 145, 156 (1878) ("The finding of the trial court upon that issue [juror bias] ought not to be set aside by a reviewing court, unless the error is manifest. . . . The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."); *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997) (re-affirming

Spring Co.'s "manifestly erroneous" formulation of the abuse of discretion standard).

Thus, this Court has stated that the abuse of discretion standard "counsels restraint" and that reviewing courts "'must give the benefit of every doubt to the judgment of the trial judge'" before reversing. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438-39 (1996) (quoting *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2d. Cir. 1961)). A decision that presents only a *possibility* of prejudice cannot, by any definition of the phrase, be "manifestly erroneous," and reversing on this basis can hardly be considered an act of "restraint."

Requiring a showing of actual prejudice is necessary to preserve a district court's "inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n. 4 (1984). This inherent authority is the reason that the highly deferential abuse of discretion standard applies to all stages of a district court's management of a trial, whether it involves a district court's decision to dismiss a lawsuit in its entirety, *United States v. Taylor*, 487 U.S. 326, 335-36 (1988) or involves a district court's evidentiary rulings. *Old Chief v. United States*, 519 U.S. 172, 174 (1997).

Under the abuse of discretion standard, it is not sufficient grounds for reversal that the reviewing court disagrees with the district court's ruling or would have handled matters differently if it were to decide it as a matter of first impression. *National Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam) ((citing C. Wright & A. Miller, *Federal Practice*

and Procedure: Civil § 2284, ¶ 765 (1970); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1211 (8th Cir. 1973); *Baker v. F & F Inv.*, 470 F.2d 778, 781 (2d Cir. 1972)). *See also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (noting that the abuse of discretion standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently"). Thus, a district court is entitled to choose among different alternatives without being reversed, so long as they are reasonable. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949).

In the present case, the Court of Appeals specifically found the district court's interpretation of the jury's request—assuming the jury meant what it actually wrote—was perfectly reasonable, noting that it "is certainly a fair reading of the jury's request for the complaint filing date." *Deicher*, 545 F.3d at 544. However, the Court of Appeals nevertheless accepted Plaintiffs' unfounded speculation about the jury's motives and gave absolutely no deference to the district court's interpretation of the jury's request and its response. In other words, it reversed because there was another reasonable alternative available to the trial court. The Court of Appeals wholly ignored the district court's conclusion that this argument lacked merit because the jury could have requested the date of the Notice of Claim if it was not satisfied with the court's answer to its query. (App. B; R.99 at 4-5.)

This is the fundamental flaw with the Seventh Circuit's new standard. Because almost any decision concerning the use of evidence or interaction with the

jury during trial can raise the specter of "possible *prejudice*," *the Seventh Circuit's new standard allows* reviewing courts to substitute their judgment for that of the trial court. Thus, because *any* relevant exhibit that was properly admitted into evidence may "possibly" affect the verdict, the practical effect of the Seventh Circuit's new standard is that district courts will be forced to provide the jury with all admitted exhibits during deliberation to avoid being reversed for abuse of discretion. *See* Don Zupanec, *Federal Litigator, Jury Deliberations—Exhibits—Availability to Jury* (Nov. 2008) (noting that under the Seventh Circuit's decision in *Deicher*, district courts should send all admitted exhibits to the jury during deliberations). Alternatively, if district courts do not routinely send all admitted exhibits to the jury, the decision below has lowered the bar so substantially as to what constitutes reversible error that the court of appeals will face a deluge of appeals asking for new trials based on the "possibility" that some inconsequential exhibit was not sent to the jury during deliberations. As such, this new test usurps the discretionary authority of the district courts to manage trials, contrary to this Court's longstanding precedent.

Finally, requiring a showing of actual prejudice rather than the mere possibility of prejudice is particularly important when examining a discretionary ruling during the damages phase of a bifurcated trial. Allowing a reviewing court to reverse and order a new trial based solely on its conclusion that there was possible prejudice—i.e., a possible effect on the damages verdict—would allow appellate courts the ability to covertly remand cases in which they disagreed with the

jury's assessment of damages. *Compare Deicher*, 545 F.3d at 545 (finding an abuse of discretion because "plaintiffs requested one million dollars in punitive damages and alluded that even more might be appropriate for compensatory damages, but the plaintiffs received only a small fraction of that amount") *with Dimick v. Schiedt*, 293 U.S. 474, 486-487 (1935) (federal court's use of additur violates the Seventh Amendment).

Prior to *Deicher*, the Seventh Circuit utilized an abuse of discretion standard consistent with this Court's precedent. Under prior case law, the Seventh Circuit routinely ruled that because the trial court is best situated to make decisions regarding jury management and evidentiary matters, the appellate court must give special deference to these decisions. *United States v. Fawley*, 137 F.3d 458, 464 (7th Cir. 1998) (citing *United States v. Covarrubias*, 65 F.3d 1362, 1370 (7th Cir. 1995) and *United States v. Hughes*, 970 F.2d 227, 232 (7th Cir. 1992)). Before changing the standard in *Deicher*, the Seventh Circuit found abuses of discretion only where "no reasonable person could take the view adopted by the trial court[,]" *Fawley*, 137 F.3d at 464, and required a showing of "manifest error." *Zurich Am. Ins. Co. v. Watts Indust., Inc.*, 417 F.3d 682, 689 (7th Cir. 2005). *See also Hughes*, 970 F.2d at 232; *United States v. Tipton*, 964 F.2d 650, 654 (7th Cir. 1992) (quoting *United States v. Manos*, 848 F.2d 1427, 1429 (7th Cir. 1988)).

In other words, before *Deicher*, the Seventh Circuit followed this Court's precedent that "[a] district court abuses its discretion if it acts arbitrarily and actual prejudice result[s]." *United States v. Mabrook*, 301 F.3d

503, 507 (7th Cir. 2002). Thus, the new standard the Seventh Circuit adopted in *Deicher* truly represents a substantial departure from the jurisprudence of this Court and the Seventh Circuit's own precedent.

C. The Seventh Circuit's New "Possibility of Error" Standard Creates a Conflict Among the Circuit Courts.

In addition to being patently inconsistent with this Court's jurisprudence, the new standard developed by the Seventh Circuit in this case creates a split of authority among the circuit courts. Most federal circuit courts evaluating a district court's discretionary decision to provide the jury with exhibits during deliberations or its response to a jury's question require a showing of actual prejudice, or, at a minimum, a high likelihood of prejudice, to overturn the decision.

For example, when discussing a trial court's authority to respond to the jury's request for additional evidence during deliberations, the First Circuit has held:

> Although the district court may, at its discretion, reread testimony where the jury makes a request to have specific testimony reread, we .... have found constitutional error only where a district court's answer to a jury's factual question *had the effect of mandating that the jury reach a conclusion* on a particular issue.

United States v. Rivera-Santiago, 107 F.3d 960, 965 (1st Cir. 1997) (emphasis added). Likewise, in *United States*

v. United Medical and Surgical Supply Corp., 989 F.2d 1390, 1406-1407 (4th Cir. 1993), the Fourth Circuit ruled that "'an error in jury instructions will mandate reversal of a judgment only if the error is determined to have been prejudicial, based on a review of the record as a whole." (quoting *Wellington v. Daniels*, 717 F.2d 932, 938 (4th Cir. 1983)). No abuse of discretion occurs when the court "*fairly responded to the jury's question* without creating prejudice." *Id.* (emphasis added).

Most federal courts are also extremely deferential with regard to a trial court's decision to send exhibits to the jury during deliberations and will reverse only upon a showing of actual prejudice. In *Young v. Lukens Steel Co.*, 881 F. Supp. 962, 975 (E.D. Pa. 1994), the court explained: "The decision of whether or not to send an exhibit to the jury room lies within the sound discretion of the district court. Refusal to submit certain evidence to the jury will constitute an abuse of discretion only if the refusal results in prejudice." *Id.* (citing *United States v. Downen*, 496 F.2d 314 (10th Cir. 1974), *et al.*). In *Young*, the court concluded that the petitioners were not prejudiced by the trial court's failure to submit certain exhibits to the jury during deliberations because the contents of disputed exhibits had been the subject of testimony during trial and the court had allowed some of petitioner's other exhibits to go to the jury. *Id.* at 975-76.

Similarly, in *Dunne v. Libbra*, 448 F.3d 1024, 1029 (8th Cir. 2006), the Eighth Circuit rejected the plaintiff's argument that he was prejudiced by the trial court's decision to withhold certain exhibits from the jury in that "his trial counsel *could have* asked the court to re-

open the evidence, admit those documents, and then send them to the jury." The Eighth Circuit stated: "We agree with the district court that this is speculative and an insufficient showing of prejudice" and that any error was "due to counsel's careless handling of exhibits." *Id. See also Hughes v. Hemingway Transp., Inc.*, 539 F. Supp. 130, 132 (E.D. Pa. 1982) ("It follows, then, that the court may deny a request by counsel to send certain exhibits to the jury room for use during deliberation. Such a denial does not constitute an abuse of judicial discretion absent a showing that the exclusion of evidence was prejudicial.") (citing *United States v. Taylor*, 480 F.2d 618, 619 (5th Cir. 1973) and *Leathers v. United States*, 471 F.2d 856, 863 (9th Cir. 1972)).

Hughes is significant in relation to the present case in that in *Hughes*, the plaintiff argued he was prejudiced by the district court's failure to provide certain exhibits because "the jury returned a verdict against him on the liability issue[.]" *Id.* The court disagreed, reasoning that "[t]he jury never requested that it be provided with the exhibits during deliberation" and the jury "understood the evidence and rendered its verdict accordingly." *Id.* (stating "the plaintiff has not shown the court how he was prejudiced"). *See also Pinn v. Lawson*, 72 F.2d 742, 744 (D.C. Cir. 1934) (ruling that a decision to withhold a church manual from jury was not an abuse of discretion: "There was no prejudice in this ruling. There was no showing that any part of the manual was relevant to any question involved in the case, and, moreover, such a matter is within the sound discretion of the trial court.").

More generally, the Second Circuit has stated that a trial judge's handling of evidence will not be disturbed unless "'manifestly erroneous.'" *In re Martin-Trigona*, 760 F.2d 1334, 1344 (2d. Cir. 1985) (quoting *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962)). *See also Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir. 1997) (refusing to find an abuse of discretion "unless it is *likely* that in some *material respect* the fact finder's judgment *was* 'swayed by the error'") (emphasis added); *United States v. Aragon*, 983 F.2d 1306, 1309 (4th Cir. 1993) (no abuse of discretion absent showing of "clear prejudice to appellants"). The Tenth Circuit and Eleventh Circuit have adopted similar standards for abuse of discretion. *United States v. Downen*, 496 F.2d 314, 321 (10th Cir. 1974) ("This court will not usurp the Trial Court's discretion absent a clear showing of abuse and resulting prejudice."); *Schoeningen v. Parrish*, 767 F.2d 788, 794 (11th Cir. 1985) ("[A]ppellants have been unable to point to specific prejudice. We find no abuse of discretion in the trial judge's decision.").

Likewise, the Fifth Circuit has stated that an abuse of discretion does not occur unless "the appellant demonstrate[s] '*an absolute absence of evidence*' to support the jury's verdict." *Baker v. Canadian Nat'l/ Illinois Cent. R.R.*, 536 F.3d 357, 365-66 (5th Cir. 2008) (quoting *Duff v. Werner Enters., Inc.*, 489 F.3d 727, 729 (5th Cir. 2007)) (emphasis added). In *United States v. Taylor*, 480 F.2d 618, 618-19 (5th Cir. 1973), the court stated:

> It is urged that the court erred in not sending various exhibits to the jury room for use in the jury deliberation. There was no request that this be done. In any event, even

> if there had been a request, whether to grant or deny the request would have been for the sound discretion of the district court. It follows that no error was committed in this connection.

(citations omitted).

Under the Sixth Circuit's standard for abuse of discretion, a trial court's discretionary determination will be reversed "only if the [court] is *convinced* that the district court erred." *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001) (emphasis added). *See also Argentine v. United Steelworkers of Am., AFL-CIO*, 287 F.3d 476, 484 (6th Cir. 2002) ("An abuse of discretion occurs when this court has a 'definite and firm conviction that the trial court committed a clear error in judgment.'") (quoted source omitted).

Even the Ninth Circuit, while not requiring actual prejudice to reverse a discretionary decision, requires more than a mere "possibility" of prejudice and applies a standard stricter than that adopted in *Deicher*. *See United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995) (discretionary ruling will not be disturbed absent evidence that "'the court's ruling more likely than not affected the verdict'") (quoted source omitted).

By ruling that the mere *possibility* of prejudice is sufficient to overturn a discretionary ruling and order a new trial, the Seventh Circuit has substantially departed from the standard used by other circuits in this context. This is evident by the fact that the decisions

discussed above failed to find actual prejudice in circumstances very similar to the case at bar—where the jury never asked for the exhibits, the exhibits were the subject of testimony during trial, and where counsel failed to ask the court to provide the exhibits in question to the jury before deliberations. *See Dunne*, 448 F.3d at 1029 (finding any claimed prejudice from court's refusal to provide exhibits in response to juror questions was "speculative and insufficient" when the "gap in the record" was due to counsel's "careless handling" of the exhibits in the first instance); *Young*, 881 F. Supp. at 975-76 (no showing of actual prejudice for failure to provide jury with exhibits where the court held a hearing on what exhibits should go to the jury room, admitting some exhibits and excluding others, and jury heard testimony regarding contents of the exhibits in question); *Hughes*, 539 F. Supp. at 132 (no showing of prejudice where "[t]he jury never requested that it be provided with the exhibits during deliberation" and the court concluded that the jury "understood the evidence and rendered its verdict accordingly").

In the present case, the district court heard arguments of counsel as to which exhibits should go to the jury during deliberations of the damages phase of the trial. Counsel for Plaintiffs did not request that the court send the jury the Notice of Claim—presumably because he concluded the exhibit related only to liability, as evidenced by counsel's failure to mention the Notice of Claim during the entire damages phase of the trial. After the jury began deliberations, it asked the district court a factual question regarding the filing date of Plaintiffs' complaint. The jury did not ask for the filing date of the Notice of Claim, much less request to see

the document. While the Notice of Claim was discussed during the testimony in the liability phase of the trial, it was not mentioned during the statements of counsel or mentioned as part of the testimony during the damages phase. However, Plaintiffs' counsel nonetheless objected to the district court's proposal to answer the jury's question and demanded that the court send back the Notice of Claim.[6] Under these circumstances—where the jury asked for factual information relating to another exhibit and did not ask to see the exhibit in question, where counsel never requested the exhibit go to the jury in the first instance, where the exhibit was never mentioned during the arguments of counsel during this phase of the trial, and where witnesses testified regarding the contents of the exhibit in an earlier phase of the trial—the district court properly exercised its discretion and concluded the exhibit was not relevant to the issues before the jury.

Any prejudice to the plaintiff under these facts was merely "speculative and insufficient" to warrant a reversal, as the court stated in *Dunne*, 448 F.3d at 1029. It cannot be said that under these facts the district court's decision was "manifestly erroneous," *In re Martin-Trigona*, 760 F.2d at 1344, or that it had the effect of "mandating that the jury reach a conclusion on a particular issue," *Rivera-Santiago*, 107 F.3d at 965, or that the jury was *likely* "swayed by the decision." *Perry*, 115 F.3d at 150. The district court in this case

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[6] Interestingly, Plaintiffs' counsel's main argument on this point was that it was error for the district court to tell the jury when the Complaint was filed because this would constitute "newly discovered evidence." (App. B; R.99 at 4-5.)

simply "fairly responded to the jury's question" and there has been no showing of actual prejudice. *United Med. and Surgical Supply Corp.*, 989 F.2d at 1407.

CONCLUSION

The Seventh Circuit's decision below created a new standard for abuse of discretion that conflicts with this Court's established abuse of discretion jurisprudence, undermines district courts' well-established inherent power to control trials and manage juries, and creates a split among the circuit courts as to the proper standard for abuse of discretion. Under this new standard, a mere "possibility" that a party was prejudiced by a district court's decision is sufficient to find an abuse of discretion and order a new trial. This new standard conflicts with established precedent from this Court that requires a showing of actual prejudice before finding an abuse of discretion and ordering a new trial. The Seventh Circuit's decision will have the effect of stripping district courts of their historic discretion to control what materials a jury may view during deliberations, as it will in effect require a district court to provide juries with all properly admitted exhibits during deliberations to avoid reversal. Finally, the Seventh Circuit's new standard creates a conflict among the circuits and is inconsistent with the standards utilized by other federal circuit courts to evaluate a district court's interaction with the jury for error.

Because the Seventh Circuit's decision below conflicts with this Court's established precedent, creates a conflict among the circuit courts, and undermines the

inherent power of district courts, this Court should grant this Petition for a Writ of Certiorari and should reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED SEPTEMBER 19, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07-2092

DAVID DEICHER and MARY MEZERA,

Plaintiffs-Appellants,

v.

CITY OF EVANSVILLE, WISCONSIN, CHRISTOPHER JONES, individually and in his official capacity as an employee of the City of Evansville Police Department, and COMMUNITY INSURANCE CORPORATION,

Defendants-Appellees.

ARGUED DECEMBER 7, 2007—DECIDED SEPTEMBER 19, 2008.

Before POSNER, ROVNER, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.* Jimmy Reiners called the police department in Evansville, Wisconsin, claiming that he needed Mary Mezera's address in order to serve papers on her regarding property that they jointly

owned. Officer Christopher Jones disclosed Mezera's address to Reiners who, as it turns out, is her abusive ex-husband against whom she had a restraining order. Mezera and her husband, David Deicher, sued the City of Evansville, Wisconsin, Officer Jones, and the City's insurer, Community Insurance Corporation, alleging that Officer Jones violated the Driver's Privacy Protection Act ("DPPA") when he disclosed Mezera's address. After a jury verdict in the plaintiffs' favor, the jury awarded $25,000 in damages.

The plaintiffs appeal, contending that the district court erred when it answered a question from the jury by providing the filing date of the complaint, which was not in evidence, but not the Notice of Claim, a properly admitted exhibit filed prior to the complaint that indicated the plaintiffs' intent to file suit. We find that the district court properly took judicial notice of the complaint filing date, but because there is a reasonable possibility that this date confused the jury, the court erred by failing to provide the jury with the Notice of Claim.

The plaintiffs also object to the district court's calculation of the attorneys' fees, maintaining that the court committed error by limiting the attorneys' fees to the amount won at trial; however, since a new trial on damages is warranted, we need not reach this issue. Therefore, we reverse the judgment and remand for a new trial on damages and a new determination of attorneys' fees.

Appendix A

I. BACKGROUND

Mary Mezera divorced her then-husband Jimmy Reiners after years of physical and psychological abuse. On October 1, 2005, Mezera and her new husband, David Deicher, left their home in Evansville, Wisconsin, and moved to a new location in Beaver Dam, Wisconsin, which they kept secret from Reiners. On February 2, 2006, Reiners called the Evansville Police Department looking for Mezera's home address, allegedly for the purpose of obtaining past due mortgage payments on property that he jointly owned with Mezera. Officer Jones placed Reiners on hold, obtained the plaintiffs' new address from the State of Wisconsin motor vehicle records, and provided it to Reiners. He claims that he provided the address after doing a brief check of Wisconsin's civil litigation database, but this database also contained Reiners's and Mezera's divorce decree.

Reiners then attempted to contact the plaintiffs by leaving a note in their mailbox. Mezera testified that following the disclosure of her address, she received a threatening phone call from Reiners; that she came home on the day of Reiners's birthday to find a table overturned outside of her home; and that she lived in constant fear that Reiners would return to harm her, Deicher, or their animals. The plaintiffs complained to the Evansville Police Department, which began an investigation. The Department concluded that Officer Jones made a serious error by disclosing the plaintiffs' address and he was reprimanded.

Appendix A

On April 22, 2006, the plaintiffs served a letter on the Evansville Police Department entitled "Notice of Claim," which informed the Department that the plaintiffs intended to file a lawsuit. The plaintiffs filed suit on June 30, 2006 against Officer Jones, the City of Evansville, and its insurer for violating the DPPA. That statute prohibits anyone from obtaining or disclosing information from motor vehicle records, subject to certain exceptions. *See* 18 U.S.C. § 2724(a).

At trial, the plaintiffs argued that Officer Jones falsified his report regarding the incident with Reiners to provide a potential defense to the plaintiffs' DPPA claim. There is an exemption to DPPA liability if the information was given to a third party for "use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court." 18 U.S.C § 2721(b)(4).

Officer Jones's report, which he claimed to have prepared a few days after he disclosed the plaintiffs' address, stated that the plaintiffs' address was provided to Reiners for "service of process" of documents relating to the foreclosure of a trailer that Mezera and Reiners owned during their marriage. The report further states that Officer Jones had run Reiners's name through a federal law enforcement database before giving out the plaintiffs' address. The plaintiffs claim, however, that

this information was entered into the computer system months after the incident, specifically after the Department received the plaintiffs' Notice of Claim indicating that they planned to file suit over the DPPA violation.

At trial, the plaintiffs maintained that the Police Department initiated an extensive coverup of this incident. Officer Jones testified that he ran a background check on Reiners through a federal law enforcement database prior to disclosing the plaintiffs' address, which revealed no criminal background. There was no record in the system, however, of Officer Jones ever accessing state or federal records on February 2, 2006. In addition, the Chief of the Evansville Police Department acknowledged that he wrote a letter to the manager of the federal law enforcement database asking whether Officer Jones conducted the requisite background check on Reiners and received a response that Officer Jones had never run Reiners's name through the federal database. Although Officer Jones was reprimanded for disclosing the plaintiffs' address, on cross-examination the Chief admitted that Officer Jones was not disciplined for stating in his official police report that he had run Reiners through the federal database, nor was the report ever corrected to reflect that the federal background check had never been conducted.

Officer Jones also testified that he ran a background check on Reiners through various Wisconsin databases prior to disclosing the plaintiffs' address, but this information was not in his report and the records from

the database showed that Reiners's name was run days after he contacted Officer Jones. The Wisconsin databases also disclosed that Mezera had a restraining order against Reiners, although Officer Jones denied under oath having seen the order. Had he actually run the background check, the plaintiffs contend, Officer Jones would have discovered that Reiners had a violent history and a restraining order against him that would have alerted Officer Jones not to provide Reiners with the plaintiffs' address. Furthermore, the plaintiffs argue that Reiners never mentioned anything about "serving papers" in his call with police, undermining the truthfulness of Officer Jones's report.

After a one-day trial on liability, the jury found that Officer Jones provided the plaintiffs' address to Reiners in violation of the DPPA and returned a verdict in their favor. During the trial to determine damages, the jury sent a question to the court asking for the date the case was filed. That date had not been entered into evidence. Both the parties objected, the defendants because they were not sure why the jury needed the date and the plaintiffs because they believed that what the jury actually wanted to know was the date when the Notice of Claim had been served on the defendants, not the date the complaint had been filed. The district court provided the date the case had been filed, commenting: "Over the objection of counsel, the Court is going to provide this very meaningful piece of information to the jury. And I'll tell them also the sun rises in the east and sets in the West [sic] if they want to know."

The jury awarded Mezera $14,500 and Deicher $1,000 in compensatory damages. The latter was increased upon the plaintiffs' motion to the statutory minimum of $5,000. The jury also awarded the plaintiffs $5,500 in punitive damages, for a total damages award of $25,000. These amounts were substantially less than the amounts that the plaintiffs asked for at trial, where they contended that they suffered severe emotional trauma after learning that Reiners knew where they lived.

The plaintiffs moved for a new trial based on the district court's communication to the jury of information outside the record, and they maintained that the punitive damages award was grossly inadequate. They also sought attorneys' fees under the DPPA, 18 U.S.C. § 2724(b), seeking the lodestar of $192,062.50 incurred in litigating their case. The district court first denied $50,345 of the fee request, stating that certain billed hours were duplicative, excessive and/or unnecessary. Rather than awarding the $141,717.50 remaining after this reduction, however, the court then limited the fee award to $25,000 on the rationale that the attorneys' fees should not exceed the amount the jury awarded to the plaintiffs in damages.

The plaintiffs' counsel then moved for an additional $13,276 in fees for litigating the fee award. The district court awarded one-eighth of this request, or $1,659.50, reasoning that since the plaintiffs had received one-eighth of what had been requested in fees for the main litigation, they should receive one-eighth of the amount

requested for litigating the fee award. The court then denied the plaintiffs' motion for a new trial on damages.

II. ANALYSIS

A. The district court was entitled to take judicial notice of the complaint filing date.

We review the district court's denial of a motion for a new trial for an abuse of discretion. *Huff v. Sheahan*, 493 F.3d 893, 899 (7th Cir.2007). The plaintiffs claim that a new trial is required on the issue of damages because the district court answered a jury question with information extrinsic to the record—the complaint filing date—and committed error *per se* which, the plaintiffs maintain, by definition means that the improper communication influenced the jury's verdict. Specifically, they argue the district court should have provided the jury with the date of the Notice of Claim and not the complaint filing date which, they claim, was improper extrinsic evidence. We review the district court's answer to a jury question for an abuse of discretion. *United States v. Hewlett*, 453 F.3d 876, 880 (7th Cir.2006); *United States v. Sababu*, 891 F.2d 1308, 1333 (7th Cir.1989).

It is undisputed that the complaint filing date was not admitted into evidence. *See United States v. McClellan*, 165 F.3d 535, 551 (7th Cir.1999) ("Should the jury request clarification on a matter during deliberations, it is when the court responds with a misleading, incorrect, unclear or unresponsive (i.e., not with 'concrete accuracy') statement of law or fact, *or*

with facts not in evidence, that we might have cause for concern.") (emphasis added). However, the complaint filing date, similar to other documents that are either directly related to or produced during the course of the proceedings, does not generate the same concerns that are present when evidence that is outside the scope of the proceedings is introduced. *See In re Hanford Nuclear Reservation Litig.,* 497 F.3d 1005, 1033 (9th Cir.2007) (finding that evidence from the defendant's first trial, although not introduced into evidence and improperly referenced during the second trial, was not extrinsic information); *Smith v. Duncan,* 297 F.3d 809, 815 (9th Cir.2001) (taking judicial notice of state court documents that were not admitted into evidence but had a direct relationship to the appeal).

We could find no cases where circuit courts have resolved the issue of whether a court may take judicial notice of the complaint filing date, but several district courts have held that a court may take judicial notice of the date a complaint is filed, and once it does so, that information is no longer extrinsic to the record. *See, e.g., Gilman v. Schwartz,* No. 05 C 2222, 2006 WL 2827409, at *1, n. 1 (E.D.Cal. Sept.29, 2006) (taking judicial notice of the complaint filing date because that date was essential to the adjudication of the issues in the case); *Gulf Ins. Co. v. Glasbrenner,* 343 B.R. 47, 63 (S.D.N.Y.2006).

Additionally, a court can take judicial notice of matters of public record. *Pugh v. Tribune Co.,* 521 F.3d 686, 691, n. 2 (7th Cir.2008) (taking judicial notice of

stock prices); *see also Lee v. City of Los Angeles,* 250 F.3d 668, 689 (9th Cir.2001) (holding that a district court can take judicial notice of a waiver of extradition, which is a matter of public record, but erred by taking judicial notice of disputed facts). Since the complaint filing date is a matter of public record and subject to judicial notice, we find that it is not extrinsic evidence.

B. The district court abused its discretion when it failed to provide the jury with the Notice of Claim during deliberations.

Although the district court was entitled to take judicial notice of the complaint filing date, its decision to provide this information to the jury brought out a fundamental error in the proceedings: its failure to allow the jury to consult the Notice of Claim during deliberations even though the plaintiffs had requested the jury be allowed to do so. A district court's answer to a jury's question must be viewed in light of the issues presented at trial. *See, e.g., United States v. Watts,* 29 F.3d 287, 291 (7th Cir.1994). The answer to a jury question might implicate other evidence presented in the case, *id.*, and this is the situation with the Notice of Claim exhibit that was excluded from the jury here.

Generally, it is within the trial court's discretion to determine which exhibits are provided to the jury during deliberations; we review this decision only for a clear abuse of discretion. *United States v. Biggs,* 491 F.3d 616, 623 (7th Cir.2007); *United States v. Arroyo,* 406 F.3d 881, 886 (7th Cir.2005). Such discretion is usually exercised

to exclude exhibits that neither party has relied on, that have no relevance to any of the issues central to the case, or that are cumulative, prejudicial, confusing, or misleading. *See* Fed.R.Evid. 403 (allowing the judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); *see also United States v. Gross*, 451 F.2d 1355, 1359 (7th Cir.1971) (affirming the exclusion of exhibits that contained conflicting statutes and ordinances that had no bearing on issues in the case). The clear abuse of discretion standard is deferential and recognizes that "[t]he admission or exclusion of evidence is a matter particularly suited to the broad discretion of the trial judge." *United States v. Casoni*, 950 F.2d 893, 902 (3rd Cir.1991) (internal quotation marks and citation omitted). In applying this standard, we give "special deference" to the district court's handling of the exhibits, *Biggs*, 491 F.3d at 623, but we must still consider whether the district court has exercised its discretion in a reasonable manner. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Service, Inc.*, 131 F.3d 625, 628 (7th Cir.1997) ("A decision constitutes an abuse of discretion when it is 'not just clearly incorrect, but downright unreasonable.' ") (citation omitted); *see also Casoni*, 950 F.2d at 902 (noting that the discretion accorded to district courts "is not unlimited").

The situation before us, where the appellant argues that a district court has denied a request to have the

jury consult a properly admitted exhibit, seems to be rare. More commonly, a party argues that a jury has been exposed to information not admitted into evidence. In the latter case, to obtain a new trial, a party must show that it was prejudiced by the improper exposure. *See United States v. Magana,* 118 F.3d 1173, 1183 (7th Cir.1997) ("Even if a defendant alleges that improper material was before the jury . . . he must still show 'that there was some prejudice or substantial right affected by the presence.' ") (citation omitted); *see also Bankcard America, Inc. v. Universal Bancard Systems, Inc.,* 203 F.3d 477, 483 (7th Cir.2000) ("When unapproved material reaches the jury, the trial court must decide whether there is a reasonable possibility the material altered the jury's verdict.").

We have also required a showing of prejudice for properly admitted exhibits that allegedly improperly influenced the jury. *United States v. Best,* 939 F.2d 425, 429 (7th Cir.1991) (en banc) (finding that the jury was not prejudiced by exposure to evidence that had been properly admitted at trial); *see also United States v. Parker,* 491 F.2d 517, 521 (8th Cir.1973) ("Probative value of evidence admitted must be weighed against possible prejudice that may result if the exhibits are sent to the jury."). Thus, we hold that a new trial is required if there is a reasonable possibility that a party is prejudiced by the district court's failure to provide certain exhibits to the jury, even if the exhibits are properly admitted. *See generally Bankcard America, Inc.,* 203 F.3d at 480-81 ("A new trial is granted if the verdict is against the manifest weight of the evidence or if a prejudicial error

occurred. Even if errors occurred, no new trial is required if the errors were harmless."); *cf. Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142 (7th Cir.1992) (where jury was exposed to extraneous evidence, the inquiry is "whether there is a reasonable possibility that the communication altered [the jury's] verdict") (internal quotation omitted); *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir.1991) (same). Where a district court has unreasonably excluded exhibits from the jury to the detriment of a party and there is a reasonable possibility that the exclusion of this evidence influenced the verdict, this is a clear abuse of the district court's discretion.

Applying these standards, we find that the plaintiffs were prejudiced by the district court's failure to provide the jury with the Notice of Claim, and its refusal to do so was a clear abuse of discretion.[1] When the jury asked for the complaint filing date, both the plaintiffs and the defendants objected. The plaintiffs specifically asked that the jury be given the date of the Notice of Claim

1. Although on appeal the plaintiffs couched most of their arguments in terms of the complaint filing date being inadmissible because it was extrinsic to the record, there is no issue of waiver here. The plaintiffs specifically reference the district court's failure to provide the jury with the Notice of Claim in their brief, objected strenuously in the district court over this specific issue, and raised it in their motion for a new trial. *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 610 (7th Cir. 2006) ("To preserve an issue for appellate review, a party 'must make a proper objection at trial that alerts the court and opposing party to the specific grounds for the objection.' ") (internal citation omitted).

and argued that what the jury really wanted to know was when the defendants learned about the lawsuit, since during trial the plaintiffs had provided arguments and evidence on this point. The district court refused. After reading the question from the jury, the following exchange took place between the district court judge and the plaintiffs' counsel:

> **Plaintiffs' counsel:** Your honor, I renew our request that they get the date of claim.
>
> **The Court:** I deny that request. Because that isn't even close to what they want. You don't know. I know exactly what they want. They don't even know there is a notice.
>
> . . .
>
> **The Court:** What's the objection to sending them the date this case was filed?
>
> **Plaintiffs' counsel:** Because I don't believe that's what they're interested in, your Honor. What they want to know is when these people first learned that there might be a lawsuit. We made an argument about that. We presented an exhibit about that. That's why we put the exhibit in showing the notice of claim, and we questioned Chief McElroy about it. That's what they're interested in is when the Defendants learned about the lawsuit. I think. And the only way to find out if that's

> the cases is to give them that exhibit, which is admitted in evidence. If that's not the one they want, they's [sic] can come back with the question, "No. We want to know when the suit was filed." At that point, you can give them that.
>
> **The Court:** I can give it right now, and I am giving it right now.

We are particularly troubled by the district court's statement that "They don't even know there is a notice" when plaintiffs' counsel asked that the Notice of Claim be sent back to the jury. Given that the Notice of Claim was a properly admitted exhibit and central to the plaintiffs' theory of damages, the district court's statement was clearly wrong. In fact, it was very pertinent to the proceedings and was relevant to whether there was a willful violation of the DPPA. *See* 18 U.S.C. § 2724(b) (stating that the court may award punitive damages "upon proof of willful or reckless disregard of the law").

Furthermore, the district court's decision to provide the complaint filing date to the jury, but not the Notice of Claim date, skewed the proceedings in favor of the defendants. In *McClellan*, 165 F.3d at 551, we held that "a judge's response to a jury's question must not highlight one witness' testimony over another's"; the same rationale applies when the district court's

response to a jury's question implicates exhibits that provide not only context for the answer given to the jury, but might also clarify any potential discrepancies or confusion that result from answering the question in the first place. *See United States v. Carani*, 492 F.3d 867, 874 (7th Cir.2007) ("[T]he district court retains broad discretion in deciding how to respond to a question propounded from the jury and . . . the court has an obligation to dispel any confusion quickly and with concrete accuracy.") (citing *United States v. Sims*, 329 F.3d 937, 943 (7th Cir.2003)).

The defendants claim that there may be another explanation for the jury's request for the complaint filing date—that it wanted to determine whether or not the plaintiffs had incurred medical expenses and treatment prior to the date the action was filed. That is certainly a fair reading of the jury's request for the complaint filing date, for the jury also asked several questions regarding the plaintiffs' medical expenses. But there is a reasonable possibility that the jury's request for the complaint filing date was to determine if the case was filed before or after the final police report was completed. Given this possibility, we cannot say that the jury was not prejudiced by the district court's failure to provide it with the Notice of Claim.

The district court had several options at its disposal: it could have given all of the exhibits to the jury at the close of evidence, provided the jury with the Notice of Claim with a proper limiting instruction, given a factually correct explanation why it was not appropriate for the

exhibit to be given to the jury at all, or it could have opted to provide neither date to the jury. *See United States v. Salerno,* 108 F.3d 730, 745 (7th Cir.1997) ("[A]s long as the district court is evenhanded in its evidentiary rulings, [it] has wide discretion in determining whether an exhibit will be allowed to go into the jury deliberation room.") (citation omitted); *United States v. Samples,* 713 F.2d 298, 303 (7th Cir.1983) (finding that "the district judge did not selectively send only prejudicial evidence to the jury room [because] [a]ll exhibits, the government's and the defendant's, were given to the jury"). We likely would have found all of these to be a reasonable exercise of discretion.

Normally, the district court's failure to provide a properly admitted exhibit to the jury during deliberations would not cause an alarm: the court is entitled to instruct the jurors to rely on their collective memories in instances where the trial was short, as it was here, and the information should be fresh in the jurors' minds. *United States v. Guy,* 924 F.2d 702, 708 (7th Cir.1991) (finding that the refusal to provide a jury with a transcript is not an abuse of discretion when the trial is short and the jurors should be able to remember the pertinent testimony). Here, however, we find that the district court's exclusion of the Notice of Claim from the jury deliberations was an abuse of discretion. The amount awarded in damages reflects the jury's skepticism of the plaintiffs' theory of liability, and indicates possible confusion between the date of the complaint and the date of the Notice of Claim. The plaintiffs requested one million dollars in punitive

damages and alluded that even more might be appropriate for compensatory damages, but the plaintiffs received only a small fraction of that amount. If the plaintiffs are ultimately awarded the same amount on remand, it should be done upon consideration of the most pertinent evidence in the record.

In reaching this outcome, we note that this decision should not, in any way, be seen as diminishing the discretion that district courts have to determine which exhibits should be provided to the jury during deliberations. But this discretion cannot be exercised in a manner that unduly burdens the jury's ability to come to a fair and accurate resolution of the issues in the case. We urge the district court to revisit its established practice (though not stated in writing in the rules of the court or anywhere else) of allowing only certain exhibits to go back to the jury, specifically when an exhibit has been properly admitted into evidence, is integral to the issues in the case, and a party requests that the jury receive it.

Accordingly, we find that the plaintiffs require a new trial on damages, and we need not reach the question of whether the district court erred in calculating attorneys' fees. *See generally Pardo v. Hosier*, 946 F.2d 1278, 1285 (7th Cir.1991) ("When a judgment on which an award of attorneys' fees to the prevailing party is based is reversed, the award, of course, falls with it."). We note, however, that the way in which the district court made its fee calculations is likely unreasonable in light of the fact that the plaintiffs ultimately prevailed at trial. Here,

the district court relied solely on the plaintiffs' limited damages award in cutting their attorneys' fee recovery by almost 90%. After finding that some hours were duplicative and unnecessary, the district court initially found that the plaintiffs' counsel was entitled to a lodestar of $141,717.50 (an amount that the plaintiffs dispute), but the court went even further and reduced this amount to $25,000 to match the $25,000 judgment awarded by the jury. It also applied a similar rationale in reducing the amount that the plaintiffs requested for attorneys' fees in litigating the fee award—the district court awarded the plaintiffs one-eighth of the fees requested in connection with the litigation of their fee petition because the plaintiffs recovered one-eighth of the fees that they had requested for litigating the case.

While the plaintiffs' success at trial is certainly one consideration in reducing fees, *see Simpson v. Sheahan*, 104 F.3d 998, 1001 (7th Cir.1997), this factor, although important, is not necessarily dispositive. *See Spegon v. Catholic Bishop of Chi.*, 175 F.3d 544, 558 (7th Cir.1999) ("although the fee award need not be proportionate to the amount of damages a plaintiff actually recovers, it is a factor that a court should consider when contemplating a reduction of the modified lodestar amount"); *Simpson*, 104 F.3d at 1001 (besides success at trial, other considerations in reducing attorneys' fees are the significance of the legal issue and the public purpose of the litigation).

The defendants' counsel stated in oral argument that its fees were approximately $120,000 to litigate this case,

a fact that provides some indication that the $142,000 lodestar that the district court initially calculated for the plaintiffs' attorneys' fees was a reasonable amount to expend on litigation. It cannot be the case that the prevailing party can never have a fee award that is greater than the damages award, or in the alternative, if the party asks for a bigger damage award than it actually receives, that any fees incurred in litigating the case are automatically reduced to the same amount as the damage award. In any event, the district court's decision to provide the complaint filing date but exclude the Notice of Claim exhibit from the jury prejudiced the plaintiffs, and we conclude that this was an abuse of discretion, requiring a new trial on damages.

III. CONCLUSION

Accordingly, we REVERSE the decision of the district court and REMAND for a new trial on damages. Circuit Rule 36 shall apply.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN ENTERED APRIL 12, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

06-C-356-S

DAVID DEICHER and MARY MEZERA,

Plaintiffs,

v.

CITY OF EVANSVILLE, WISCONSIN, CHRISTOPHER JONES and COMMUNITY INSURANCE CORPORATION,

Defendants.

MEMORANDUM AND ORDER

On February 14, 2007 judgment was entered in the above entitled matter in favor of plaintiff Mary Mezera against defendant Christopher Jones in the amount of $14,500 together with costs, in favor of plaintiff David Deicher against defendant Christopher Jones in the amount of $5,000.00 together with costs and in favor of plaintiffs against defendants in the amount of $5,500.00 together with costs for a total of $25,000.

Appendix B

On March 1, 2007 plaintiffs moved pursuant to Rule 59, Federal Rules of Civil Procedure, to set aside the jury verdict on damages and for a new trial on damages. Plaintiffs also move for costs and attorney fees. These motions have been fully briefed and are ready for decision.

FACTS

Plaintiffs commenced this action on June 30, 2006 claiming that defendants violated the Driver Privacy Protection Act. In their second amended complaint they sought both actual and punitive damages together with attorney fees. Plaintiffs' motion for partial summary judgment was denied on December 18, 2006.

In the joint final pretrial report plaintiff listed special damages as follows: Medical Bills; $14,600.00 (Mezera); $322,368.00 (Deicher); Medication, $1,553.00; Lost wages, $2,930.00 and relocation expenses, $32,000.00. Jury trial commenced on February 12, 2007. The jury found for plaintiffs on liability on February 12, 2007.

The damages phase of the trial commenced on February 13, 2007. The jury began deliberating on damages at 4:16 p.m. on February 13, 2007. At 5:28 p.m. the Court convened to address the following question from the jury: "On what date was this case filed by plaintiff?" Plaintiffs' counsel stated, "The only piece of evidence in the record is the notice of claim." Defendants' counsel stated, "Your honor, I can only say

that the date on which this case is filed is not in evidence. And, therefore, I don't think it can be given to them."

The Court responded to the jury question as follows, "Members of the jury, the case was filed by the plaintiffs in this Court on June 30, 2006 at 1:48 p.m." Plaintiffs' counsel continued to object to this answer.

The jury deliberated until 7:42 p.m. They asked six more questions. The jury returned a verdict finding plaintiff Mezera was entitled to $14,500.00 in compensatory damages and plaintiff Deicher was entitled to $1,000.00 in compensatory damages. The Court amended the verdict to award plaintiff Deicher $5,000 in damages as required by statute.

The jury then found that one or more defendants demonstrated a wilful or reckless disregard for the law in the disclosure of plaintiffs' address to a stranger over the telephone. The jury awarded plaintiffs $5,500.00 in punitive damages.

MEMORANDUM

Motion for a New Trial on Damages

Plaintiffs seek to set aside the jury verdict on damages and to have a new trial on damages. In deciding plaintiffs' motion for a new trial pursuant to Rule 59, Federal Rules of Civil Procedure, the Court must consider whether the trial was unfair to the moving party. *Forester v. White*, 846 F.2d 29 (7th Cir.1988). The

Court must determine whether the verdict is against the weight of the evidence or whether the damages are excessive or inadequate. *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir.1996).

Plaintiffs argue that they are entitled to a new trial on the issue of damages because of the Court's answer to the jury's first question during their deliberations in the damages stage of trial. The District Court has broad discretion in answering questions asked by the jury during deliberations. *U.S. v. Hewlett*, 453 F.3d 876, 889 (7th Cir.2006).

The jury asked, "On what date was this case filed by plaintiff?" The Court answered, "Members of the jury, the case was filed by the plaintiff in this Court on June 30, 2006 at 1:48 p.m."

Plaintiffs argue that this was new evidence that could not be submitted to the jury. In *Lussier v. Runyon*, 50 F.3d 1103 (1st Cir.1995), the Court held, ". . . a district court, absent waiver or consent, ordinarily may not receive additional factual information of a kind *not susceptible to judicial notice* unless it fully reopens the record" (emphasis added). The filing date was a fact of which the Court could and did take judicial notice. It was proper to provide this fact to the jury when asked.

Plaintiffs argue that instead of answering the question that the jury asked the Court should have provided the date the notice of claim was filed. This argument is speculative at best because the jury did

not ask for or refer to the notice of claim. If, in fact, the jury wanted to know when the notice of claim was filed, or was not satisfied with the Court's answer, it could have asked that question in the subsequent two hours of deliberation as suggested by plaintiffs' counsel during discussion over the answer to be provided.

Plaintiffs further argue that the Court's answer to this question affected the verdict. Had the answer to the question been false the Court would decide whether there is a reasonable possibility that the Court's communication altered the verdict. It did not. Plaintiffs presented evidence in the damages phase of trial that they had filed a notice of claim against the City of Evansville on April 21, 2006 and that defendant Jones altered his report in May. It is plaintiffs' contention that because the jury was provided the date the case was filed in this Court and not the date the notice of claim was filed the jury found that Jones had not altered his report in response to the suit. This argument lacks merit. Had the jury wanted to know when the notice of claim was filed it would have asked that question instead of the one it did. Whether they wished it or not plaintiffs presented evidence during the damage phase as above that notice of claim was filed April 21, 2006 and defendant Jones altered his report in May.

Plaintiffs are not entitled to a new trial as to damages on this ground.

Plaintiffs also argue that the punitive damages award is unfair because it is grossly inadequate.

Appendix B

The jury's award of compensatory damages suggests that it awarded damages for the injury suffered after defendant Jones released plaintiffs' address to Jimmy Reiners. That damage arose from Jimmy Reiner's one contact with plaintiffs after receiving their address. This award was reasonable based on the evidence.

The jury then found that the conduct demonstrated by one or more defendant to be a wilful or a reckless disregard for the law by disclosing the plaintiffs' address.

The jury was instructed as follows concerning punitive damages:

> If your verdict is in favor of one or both plaintiffs you may, but are not required to, assess punitive damages against defendants. The purposes of punitive damages are to punish defendants for their conduct and to serve as an example or warning to a defendant and others not to engage in similar conduct in the future.
>
> Plaintiffs must prove by a preponderance of the evidence that punitive damages should be assessed against defendants. You may assess punitive damages only if conduct demonstrating a wilful or reckless disregard of the law is shown. Conduct is in willful disregard of the law if it is shown defendants

knew they were violating the law. Conduct is in reckless disregard of the law if, under the circumstances, it reflects complete indifference to a plaintiff's safety or rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that the court has described to you, but should not reflect biases, prejudice or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

The reprehensibility of the defendant's conduct

The impact of defendant's conduct on plaintiffs

The relationship between plaintiffs and defendants

The likelihood that defendants would repeat the conduct if an award of punitive damages is not made

The relationship of any award of punitive damages to the amount of actual harm suffered by the plaintiffs.

Appendix B

The jury was not required to award any punitive damages according to this instruction but could do so where it found a defendant wilfully or recklessly disregarded the law. The jury was instructed to consider certain factors including the relationship of the award of punitive damages to the amount of actual harm suffered by the plaintiffs. Another factor to be considered was whether the punitive damages would deter future misconduct. The jury awarded plaintiffs $15,500.00 in actual damages. The award of $5,500.00 in punitive damages is reasonably related to the actual damages awarded and would deter future misconduct.

The jury followed the instructions it was provided. This punitive damages verdict is not grossly inadequate nor is it against the weight of the evidence. *Briggs v. Marshall*, 93 F.3d at 360. Accordingly, plaintiffs' motion for a new damages trial will be denied.

Motion for Attorney Fees

Plaintiffs request attorney fees in the amount of $194,312.50 and costs in the amount of $13,342.67. In their reply brief plaintiffs reduce their request to $192,062.50 to reflect a reduction for the amount spent on a motion to reconsider which was not filed. Under the Driver Privacy Protection Act the Court may award plaintiffs reasonable attorney fees and other litigation costs reasonably incurred. 18 U.S.C. § 2724(b).

The starting point for determining the amount of reasonable attorney's fees to be awarded is the number

of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1982). Defendants do not object to the hourly rate requested for Attorneys Richard Burnham ($300.00), Betty Eberle ($275.00) and Sarah Siskind ($475.00).

Defendants do make specific objections to the number of hours reasonably expended by these attorneys in Table One, attached to Attorney Mark Hazelbaker's affidavit. The objections to specific time entries include duplicative, excessive and unnecessary. The Court has reviewed these objections and the plaintiffs' responses to them and determines that the specific time entries were duplicative, excessive and/or involved unnecessary time spent by plaintiffs' attorneys. Accordingly, the Court finds that defendants requested reductions for the time spent by plaintiffs' attorneys are reasonable. These reductions include the reduction to which plaintiffs concede in their reply brief.

Based on these reductions, the attorney fees for Attorney Burnham would be $59,176.25, for Attorney Eberle, $82,541.00 and for Attorney Siskind, $0.00, for a total of $141,717.50. This is the lodestar amount.

Defendants argue that this lodestar amount should be reduced because of the difference between the judgment received and the recovery sought. First, defendants seem to be arguing that the offer they made in settlement discussions immediately prior to the trial in this matter is relevant to this discussion. Such offers

are confidential and are not relevant to the recovery to be provided. Were an offer of judgment made under Rule 68, Federal Rules of Civil Procedure, it could have been considered. But that is not the case here. Where considered it is only for the amount plaintiffs were requesting.

The United States Court of Appeals for the Seventh Circuit has held in cases where a damage award is minimal in relation to the amount of damages sought that a three part test should be used to determine the relative indicia of success. The three factors to be considered are: 1) the difference between the judgment received and the recovery sought; 2) the significance of the legal issue on which the plaintiff prevailed and 3) the public purpose of the litigation. The first factor bears the most weight, whereas the second factor bears the least. *Simpson v. Sheahan*, 104 F.3d 998, 1001 (7th Cir. 1997).

The Court of Appeals has held that in determining the proper amount to reduce a plaintiff's fee award to reflect the degree of success obtained, the district court has considerable discretion. *Spegnon v. Catholic Bishop of Chicago*, 175 F.3d 544, 558 (7th Cir.1999).

In this case plaintiffs prevailed on the claims they raised. There is a significant difference, however, between the recovery sought and the judgment they received. Specifically, in his closing argument in the damages phase of trial plaintiffs' counsel sought a range of between one to five million dollars in compensatory

damages and one million dollars in punitive damages. Prior thereto plaintiffs' final demand was $2,200,000. The jury returned a compensatory award for $14,500 and punitive damage award for $5,500.00 as aforesaid. The recovery sought by plaintiffs was outlandish as well as unreasonable based on the evidence in this case. The jury verdict was reasonable based on the evidence presented. The Driver Privacy Protection Act serves a public purpose to protect drivers' privacy but not to provide a windfall to counsel.

With the reasonable reductions in attorney fees proposed by defendants and accepted by the Court, the plaintiffs' attorney fees award could be $141,717.50. Defendants suggest, however, that the fees be further reduced to a third of the recovery, $8,333.00 or to the amount plaintiffs recovered in damages, $25,000.00. These amounts may very well be reasonable considering the excessive demand suggested by counsel. As previously stated, the awards were reasonable while the recovery sought was substantially unreasonable and perhaps even incredible based on the evidence in this case.

The jury awarded $21,000 and the statute provided another $4,000 for a total award of $25,000. When the reasonable amount of the award is compared to the demand made by plaintiffs, the award was minimal. The award of $25,000 compared to the demand of $2,200,000 made the week before trial is one percent; compared to the demand of $1,000,000 made to the jury is three percent and compared to the demand of $6,000,000 also

offered to the jury is less than one percent. The Court uses these percentages as guidelines to determine a reasonable fee based on the minimal award received by plaintiffs. Looking at the ratios suggested by the Court, a fair fee is anywhere from $1,417.18 to $4,251.53. Although plaintiffs prevailed it was certainly not a successful endeavor as plaintiffs recognize in their post-judgment motion.

With the significant difference between the recovery sought and the judgment received, plaintiffs are entitled to the $25,000 attorney's fees suggested by defendants. The Clerk of Court is directed to address plaintiffs' bill of costs pursuant to 28 U.S.C. § 1920.

ORDER

IT IS ORDERED that plaintiffs' motion for a new trial on damages pursuant to Rule 59, Federal Rules of Civil Procedure, is DENIED.

IT IS FURTHER ORDERED that plaintiffs are AWARDED attorney's fees from defendants in the amount of $25,000 with judgment to be AMENDED accordingly.

Entered this 12th day of April, 2007.

BY THE COURT:

S/
JOHN C. SHABAZ
District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED FEBRUARY 14, 2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Case No.: 06-C-356-S

DAVID DEICHER and MARY MEZERA,

Plaintiffs,

v.

CITY OF EVANSVILLE, WISCONSIN, CHRISTOPHER JONES and COMMUNITY INSURANCE CORPORATION,

Defendants.

JUDGMENT IN A CIVIL CASE

This action came for consideration before the court with DISTRICT JUDGE JOHN C. SHABAZ presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFF MARY MEZERA AGAINST DEFENDANT CHRISTOPHER JONES IN THE AMOUNT OF $14,500 TOGETHER WITH COSTS.

Appendix C

IT IS FURTHER ORDERED THAT JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFF DAVID DEICHER AGAINST DEFENDANT CHRISTOPHER JONES IN THE AMOUNT OF $5,000 TOGETHER WITH COSTS.

IT IS FURTHER ORDERED THAT JUDGMENT IS ENTERED IN FAVOR OF PLAINTIFFS AGAINST DEFENDANTS IN THE AMOUNT OF $5,500 TOGETHER WITH COSTS.

Approved as to form this 14th day of February, 2007.

s/ John C. Shabaz
JOHN C. SHABAZ
DISTRICT JUDGE

FEB 14 2007
Date